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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Emogene Williams Cobin; Bonnie Williams Gilbert; Caroline Williams Giles; Barbara Williams Guinn; Verna Williams Hammond; Donna Williams Lockhart; Ernestine Williams Webb; Delavah Williams; Johnie Williams; Ricky Williams; Ronnie Williams; Sharon Williams PETITIONERS

VS.

James T. Castleberry, Co-executor of the Estate of Joe L. Castleberry, Deceased; City of Conway, Arkansas; Arkansas Faulkner County; Joe Martin; Jocile C. Perry, Co-executor of the Estate of Joe L. Castleberry, Deceased, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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August 22, 1991

QUESTIONS PRESENTED

I.

Whether the United State Court of Appeals for the Eighth Circuit's finding that the respondents' reasons for utilizing their peremptory challenges were not exercised in a purposefully discriminatory manner is clearly erroneous in light of the U. S. Supreme Court's holdings in Batson v. Kentucky and Edmonson v. Leesville Concrete Company, Inc., which states that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race?

II.

In determining whether the government or a private litigant has presented neutral explanation for use of peremptory challenges against blacks, should the court compare the characteristics of the individual which prompted the peremptory strike with characteristics of those not struck by the government or private litigant, in accordance with U.S. v. Wilson and Garrett v. Morris? (i.e., What

is the standard to be used in determining whether a peremptory strike against blacks is constitutionally valid or pretextual?)

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

Petitioners, who filed a civil rights action under 42 U.S.C., Section 1983 (1988) seeking recovery as the surviving relatives of Marvin Williams, an African-American who died in a jail in Faulkner County, Arkansas in 1960, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals

for the Eighth Circuit entered on April 24, 1991, which affirmed an appeal of the district court order denying their motion for a new trial following a jury verdict for the defendants, Faulkner County and two former sheriff's department employees. In the motion for new trial, plaintiffs contend that defense counsel exercised two of three peremptory challenges against African-American venirepersons in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in Williams v. Castleberry, et al, No. 90-2276, (April 24, 1991), is reproduced in Appendix A.

Further, the Memorandum and Order on this issue submitted by the United States District Court for the Eastern District of Arkansas, Western Division, (June 27, 1990), are reproduced in Appendices B and C, respectively. None of the opinions were designated for publication and are not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit which affirmed the United States District Court's denial of petitioners' motion for a new trial following a jury verdict for respondents, was rendered on April 24, 1991. Jurisdiction of this court is invoked pursuant to Rule 10(1)(c) of the Rules of the Supreme Court of the United States, on two levels. First, petitioners assert that the issue posed in Question I to be considered presents a federal question resolved by the United States Court of Appeals for the Eighth Circuit in a way that conflicts with applicable decisions of this court, namely Batson v. Kentucky, and Edmonson v. Leesville Concrete Company, Inc. The second basis for jurisdiction asserted is the issue raised in Question II. herein, which poses an important question of federal law which has not been, but should be, decided by the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the equal protection component of the Fifth Amendment's due process clause; and the equal protection clause of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> no person shall be deprived of life, liberty or property without due process of law.
>
> Fifth Amendment

> no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Fourteenth Amendment

STATEMENT OF THE CASE

The issues presented before the Supreme Court in this Petition for Writ of Certiorari originate from denials of petitioners' motion for new trial by the United States District Court for the Eastern District of Arkansas and the United States Court of Appeals for the Eighth Circuit. The petitioners

filed a civil rights action under 42 U.S.C., § 1983 (1988) seeking recovery as the surviving relatives of Marvin Williams, a 21-year-old African-American who was falsely arrested, bludgeoned to death in a jail in Faulkner County, Arkansas in 1960, and the victim of a conspiracy by defendants to deny him medical treatment and cover up the manner of his death. The motion for new trial was based upon the fact that the attorneys for defendants, Faulkner County and two former sheriff's department employees, used two of three peremptory challenges during voire dire to exclude the two African-American jurors available for the prospective jury from consideration. The reasons offered by the defendants for the racially discriminatory exclusions made in this civil rights action under 42 U.S.C., § 1983 (1988) were blatantly pretextual and racially stereotypical. A review of the record clearly fails to support the findings of the United States District Court and the Court of Appeals. For this reason, petitioners are asking the Supreme Court of

the United States to determine whether those lower court findings are clearly erroneous pursuant to Batson v. Kentucky, 476 U.S. 79 (1985), and Edmonson v. Leesville Concrete Company, Inc., 59 LW 4575 (1991).

In addition to being clearly erroneous, the lower courts' rulings also failed to take into account a determination of whether the racially discriminatory exclusions met the comparability standard for articulating racially-neutral justifications for the use of peremptories that had been set forth in United States v. Wilson 853 F.2d 606 (8th Cir. 1988).

For this reason, petitioners are asking the court to rule on the issue of setting comparability standards for articulating racially-neutral justifications for the use of peremptories. Petitioners contend that a ruling on this issue is of exceptional public importance, as standards must be set forth to prevent the government and private litigants from being able to merely fabricate pretexual

reasons to conceal racially discriminatory motives in excluding African-American venirepersons. This is exactly what happened in the current case, and it undoubtedly has happened in other instances, and will continue to do so unless the issue is resolved. The future and credibility of our nation's judicial system mandates that its integrity be preserved. Resolution of the issue is imperative for this purpose.

In addition, resolution of the issue of whether petitioners received a fair day in court is also imperative. As in Batson v. Kentucky, supra., and Edmonson v. Leesville Concrete Company Co., supra., petitioners are asking the court to recognize the impropriety of racial bias in this particular case, and to hold that the race-based exclusion violates the equal protection rights of the challenged jurors. In the present case, race was the sole reason for denying the excluded African-American venirepersons the honor and privilege of participating on the jury. A review of the facts

of this case, which are fascinating in entirety, will reveal that the acts set forth in this lawsuit were the result of racially discriminatory motives that occurred in an era of our history that was replete with racial tension and strife. The defendants had a very clear motive for wanting to ensure that no blacks sat on the jury because the stakes were high - even though their efforts to thwart the truth resulted in a twenty-four year delay before the manner of decedent's death was finally revealed. They were white men who were accused of violating the civil rights of a black man by murdering him. The stakes were high enough that they intentionally excluded two African-American venirepersons from the jury panel. For this reason, justice was not done when the case went to trial, and the petitioners, on behalf of the decedent, did not receive a fair day in court.

In addition, a recitation of the facts in this case will illuminate the great injustice that was done to Marvin Williams, After the 1960 murder,

the defendants, Faulkner County and two former sheriff's department employees, conspired to cover up his death by failing to release medical information, - including the autopsy report - and by threatening an eyewitness to the beating not to reveal what he saw. The grave injustice continued twenty-eight years later in the courtroom at trial, as defendants further perpetuated their conspiracy to cover up Marvin Williams' wrongful death through lies and fabrications. In addition, the defendants purposely acted to minimize petitioners' opportunity for a fair trial by excluding all black venirepersons from the jury panel by offering pretexual and racially stereotypical excuses for the exclusion. The end result of these deliberate and grossly wrongful acts is that justice has yet to be done.

Petitioners and their present counsel, who was retained subsequent to rulings of the other courts, are asking the Supreme Court to provide a catharsis for resolution of this matter, and to ensure that

petitioners will finally be given the opportunity they and Marvin Williams long for and deserve to receive a fair trial on this matter. It has yet to occur, and they are asking the Court, as the final arbiter in this matter, to protect Marvin Williams' constitutional rights, as well as those of the wrongfully excluded jurors.

Petitioners and their counsel have full confidence in the Court's inherent sense of fairness and abilities, and they respectfully ask the Court to consider this matter carefully, and to reach a decision that will uphold the integrity of the judicial system by ensuring that justice will prevail by inuring to protect the rights of the decedent and wrongfully excluded jurors.

Marvin Williams, of Menifee, Arkansas came into custody of the Conway police in the early hours of May 6, 1960, after being falsely arrested for being drunk in a parked car on Markham Street in Conway. He was found dead in his cell a few hours later. At a hastily called coroner's inquest that began

about noon on the same day, by the elected coroner, R. A. McNutt (now deceased), and George Hartje, the Prosecuting Attorney, officers O. H. Bill Mullenax and Marvin Iberg testified that they had found Williams in the car and taken him and a friend, Joe Flakes, to jail at the Faulkner County Courthouse.

The officers' position was that Williams had been heavily intoxicated and "stuporous" when they arrested him, and that he fell while entering the jail and struck his forehead on the west side of the courthouse steps, causing a small cut. The defendants further elaborated that as they supported the "drunken" Williams and took him to the jail, a strong wind arose and it began to rain very hard. When the wind and rain hit Marvin Williams, they contend that he "revived briefly, straightened up and the officers relaxed their grip on him. At that time, Marvin Williams suddenly fell forward and the officers were unable to catch him and prevent his fall. The result of the fall was that Marvin Williams struck his head on the courthouse

steps. The officers then picked Marvin Williams up and took him inside."[1] The officers' version of these events, including Williams' drunkenness and cause of death, are not supported by the medical evidence and testimony. The plaintiffs contend in their lawsuit that after Marvin Williams' false arrest, the arresting officers and/or jailer and sheriff actually beat Marvin Williams before arrival at the jail, after decedent was in jail, or both, causing serious physical injury, and then denied him medical treatment. Medical evidence shows that Marvin Williams' death was the result of a fracture at the base of the skull, an epidural hematoma, and a contusion of the brain.[2]

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[1] The "official" version of the events is recited in a pre-trial brief at pages 2 and 3 (attached as appendix D), submitted by defendants to the United States District Court prior to the jury trial conducted in 1987. Note that these contentions, which were the foundations of the arresting officers' testimony at the coroner's inquest, criminal trial of Iberg and Mullenax (the Conway arresting officers) in 1985 (who were acquitted by a jury in September of that year), and civil trial in 1988, are alleged by the plaintiffs to be false and perpetuated in furtherance of their conspiracy to cover up the false arrest and manner of death of Marvin Williams, as alleged in ¶ 40, page 5 of the complaint, attached hereto as appendix E.

[2] This was the conclusion of Dr. Edward O. Fox, the pathologist who performed the autopsy, and supported by

The coroner's inquest, which was comprised of 12 white men, concluded after four hours that Williams' death was accidental. This conclusion was drawn without the benefit of the results of an autopsy conducted at 3 p.m. that same day at the University of Arkansas Medical Center. The post-mortem, conducted by Dr. Edward O. Fox, who now lives in New Jersey, and Dr. Lloyd D. Seager, chairman of the Department of Pharmacology, revealed that Williams tested negative for alcohol content. In addition, the cause of death was attributed to a fractured skull and concussion behind the left ear. Those findings were not presented to the inquest panel.

Dr. Fox's findings concluded that the death was the result of severe head injuries incurred from being struck forcefully behind the left ear with some instrument. Fox further said the indentation in Williams' skull from the blow was clearly definable. Further, the blow was so powerful that it

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three other medical experts, including Dr. Fahmy Malak, Arkansas' chief medical examiner.

literally split his skull almost half way down the back of his head.[3]

Further, a superficial injury to Williams' right forehead that was reportedly suffered in the alleged fall was considered minor. But an unnamed Conway physician was quoted at that time by then-prosecutor George Hartje, Jr. (later elected Circuit Judge and then denied re-election upon conclusion of the civil case) as saying that the obvious bruised and swollen area behind Williams' left ear could have somehow been caused by the minor injury to his forehead.[4]

Suspecting that the results of the coroner's inquest were symptomatic of a cover-up, the Williams family did not believe that Marvin's death was attributable to a fall while intoxicated. Delevah and Johnie Williams, the parents of Marvin Williams, approached two local attorneys and the Federal Bureau of Investigation with their concerns

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[3] This was reported in the Arkansas Democrat on July 25, 1984, said article attached hereto as appendix 6.

[4] This was reported in the Arkansas Democrat on July 25, 1984.

that the death actually involved foul play. The attorneys and the FBI told them there was no ground for a lawsuit or further investigation. Discouraged by their rebuffed attempted to launch an investigation of their son's death, the Williams were compelled to drop the issue. In addition, due to the severe racism prevalent in the early 60's and the structure of the area's power base, Delavah Williams feared reprisals if the matter was aggressively pursued, as evidenced by his testimony at trial. (See transcript excerpts attached hereto as appendix F, pages 6-9.)

The case was given new life twenty-four years later, when Charles Hackney, an individual who had been an inmate at the Faulkner County jail the night of Williams' arrest, came forward in 1984 to tell Mike Masterson, an investigative reporter with the Arkansas Democrat, that he had additional evidence that Marvin Williams had been murdered in the jail on May 6, 1960.

Hackney, who was an inmate at the time at the Wrightsville Unit of the Arkansas Department of Correction, said that during his incarceration in the Faulkner County jail on May 6, 1960, he witnessed Williams being beaten by two officers in civilian clothes. He said that he saw Martin and Castleberry (the jailer and sheriff) enter the black area of the jail (which was then unlawfully segregated) and remove Williams to the top of a flight of stairs, where they both beat him. Hackney stated that one of the defendants, apparently Castleberry, said: "That ought to take care of that Black son-of-a-bitch forever," and that person directed another, apparently Martin, to clean up the area where the beating occurred.[5]

Hackney told reporters in July, 1984 that he was in the Faulkner County jail for grand larceny

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[5] Hackney, who was incarcerated as an habitual offender, testified before a special grand jury that indicted Iberg and Mullenax, as well as the criminal trial and civil trial. He gave his account to Masterson in an article reported in the Arkansas Democrat on February 11, 1985, attached hereto as appendix H. Also see ¶ 21 of page 6, and ¶s 33-35 of page 8 of plaintiff's complaint.

on May 6, 1960, when wind and rain gusting through a broken windowpane awakened him in a bull pen cell at 2 a.m. He said he heard noises hear the stairway that led up to the fourth floor cell block and that he moved toward the center of the cell for a closer look. Hackney saw two men in civilian clothes carrying a listless black man between them.

Hackney said one man asked the other where the prisoner had been found. The other responded he had been sleeping in a truck with his feet sticking out the window. The men dropped Williams to the floor and began striking him "more than 10 times" with what looked like blackjacks, Hackney said. After the beating, Hackney said the two men dragged the prisoner out of his sight into a nearby cell with a solid door where Hackney would hear additional blows.[6]

In addition, that night, Hackney was told by a co-conspirator whose identity is presently unknown, that if he talked about what he saw, he "would go

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[6] This was reported in the Arkansas Democrat on February 11, 1985.

out the same way."[7] Because he was threatened by co-conspirators, Hackney testified at the coroner's inquest that he did not see anything but only heard Marvin Williams' moans from the black section of the jail.

Hackney also told authorities and the Arkansas Democrat that he was taken to a small room in the courthouse later that morning and threatened by two county officials, including the prosecuting attorney, who ordered Hackney to lie at the inquest about what he had seen. As a result, Hackney testified at the coroner's inquest that he did not see anything, but only heard Marvin Williams' moans from the black section of the jail. Hackney later told the Arkansas Democrat that he lied at the inquest to protect himself.

Also at the inquest, Joe Martin, Castleberry's deputy jailer at the time, testified that he had discussed work with Williams in the cell block about 1:15 a.m. At that time, Martin said Williams

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[7] **See paragraph 36 of page 9 of plaintiffs' complaint.**

appeared uninjured except for the forehead wound and was talking about bailing out before 7 a.m. to be at his job. Martin said he testified he had agreed to awaken Williams by 7 a.m., but did not fulfil that promise after looking into the cell about 7 a.m. and finding Williams asleep. He said he looked in again around 9 a.m. and found Williams dead about noon the next day.

Iberg also testified at the inquest that he came back twice with former Police Chief C. O. Hensley (now deceased) that night to check on Williams. Iberg said Williams was sleeping and appeared all right both times.

Hackney also told the newspaper that although two FBI agents interviewed him in 1961 for a federal investigation that never developed, he had not heard the story about Williams' alleged fall on the courthouse steps until March 10, 1984, when another inmate informed him. Upon learning this fact, Hackney began writing state and federal officials about what he said he witnessed. As a result, the

FBI did a limited two week inquiry into the death which consisted primarily of interviewing Hackney and some other youths who had been with Williams the night he died.

In addition, the Democrat reported on July 15, 1984 that the FBI apparently never obtained a copy of the autopsy report during either investigation, and that Dr. Fox was never interviewed by police or the FBI about the autopsy.

The civil rights lawsuit was filed in September, 1985, alleging that Castleberry, Hartje, Martin, Iberg, Mullenax and the city and county falsely arrested Marvin Williams, severely beat him, and then conspired to deny him medical treatment and cover up the manner of this death. A special grand jury was empaneled by Governor Bill Clinton's designation in early 1985, and Mullenax and Iberg were tried and acquitted of Williams' murder in 1987. In 1986, the City of Conway, Iberg, Mullenax and George F. Hartje were dismissed as defendants by the lower courts. The civil case

was tried in July, 1988, and the all white jury found in favor of remaining defendants. Details of the voire dire in which the two African-American venirepersons were excluded from jury duty will be presented in petitioners' arguments set forth herein.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S RULING THAT THE RESPONDENTS' REASONS FOR UTILIZING THEIR PEREMPTORY CHALLENGES WERE NOT EXERCISED IN A PURPOSEFULLY DISCRIMINATORY MANNER IS CLEARLY ERRONEOUS IN LIGHT OF THE HOLDINGS IN BATSON V. KENTUCKY AND EDMONSON V. LEESVILLE CONCRETE COMPANY, INC., THAT A PRIVATE LITIGANT IN A CIVIL CASE MAY NOT USE PEREMPTORY CHALLENGES TO EXCLUDE JURORS ON ACCOUNT OF RACE.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER IN INSTANCES WHERE THE GOVERNMENT OR A PRIVATE LITIGANT HAS PRESENTED NEUTRAL EXPLANATION FOR USE OF PEREMPTORY CHALLENGES AGAINST BLACKS, THE COURT SHOULD COMPARE THE CHARACTERISTICS OF THE INDIVIDUAL WHICH PROMPTED THE PEREMPTORY STRIKE WITH CHARACTERISTICS OF THOSE NOT STRUCK BY THE GOVERNMENT OR PRIVATE LITIGANT, IN ACCORDANCE WITH U.S. V. WILSON, (i.e., WHAT IS THE STANDARD TO BE

USED IN DETERMINING WHETHER A PEREMPTORY STRIKE AGAINST BLACKS IS CONSTITUTIONALLY VALID OR PRETEXTUAL?)

Petitioners are requesting the Supreme Court of the United States to grant their Petition for Writ of Certiorari for one simple reason - justice requires it. Racial discrimination occurred in the jury selection of the venirepersons empaneled to hear the civil rights lawsuit filed on behalf of Marvin Williams, and the United States District Court and Eighth Circuit Court of Appeals wrongfully condoned it. (See decisions, attached as appendices A and C hereto.) Both courts were clearly erroneous in their holdings, and as a result, petitioners have yet to receive a fair day in court.

Therefore, petitioners appeal to the Supreme Court of the United States as the final arbiter of justice. Racial discrimination has no place in the courtroom, and the racial stereotypes interjected into this case which marred the integrity of the judicial system and prevented petitioners from receiving a fair proceeding free of the

invidiousness of racial bias will not be remedied without the high court's assistance.

The Supreme Court of the United States emphasized the tremendous importance of civil proceedings and the significance of a litigant's right to receive a fair trial free of the vestiges of race discrimination in Edmonson v. Leesville Concrete Company, Inc., supra, which held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race.

The court stated:

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. Rose v. Mitchell, 443 U.S. 545, 556 (1979); Smith v. Texas, 311 U.S. 128, 130 (1940). In the many times we have addressed the problem of racial bias in our system of justice, we have not "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." Powers, 449 U.S., at _____ (slip Op. 1). To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.

Leesville, supra, at 1578.

On July 20, 1988, racial discrimination was committed before United States District Court Judge G. Thomas Eisele in Little Rock, Arkansas at the civil trial of this lawsuit. William Adkisson, attorney for defendants Faulkner County and Joe Martin; and Robert W. Henry, attorney for the Estate of Joe L. Castleberry, used two of their three peremptory challenges to exclude James Fountain and Veola Sebastian, the only two black persons on the venire. After the jury was seated, John Wesley Hall, Jr., counsel for plaintiffs, moved for a mistrial contending that the strikes were racially motivated. After debating whether Batson applied to civil cases, defense counsel volunteered their reasons for striking the two potential jurors. The Court ruled those reasons were neutral and denied plaintiff's motion. The trial then proceeded before an all-white jury.

The jury ruled favorable to defendants after a five day trial. Within thirty days, plaintiffs

filed notice of appeal renewing their motion for new trial, attached hereto as appendix AA. United States District Judge G. Thomas Eisele ruled on petitioners' motion two years later on June 27, 1990, after awaiting a ruling upon the Eighth Circuit's rehearing en banc in United States v. Wilson, 867 F.2d 486 (8th Cir. 1989).

In rendering this decision, Judge Eisele did not reach the question of whether Batson applied, reasoning that even if it did, the plaintiffs were not deprived of equal protection because the striking of the two black venirepersons was based on racially neutral reasons. In reaching this conclusion, Judge Eisele correctly applied Batson's three-step approach in considering a litigant's equal protection claim, but incorrectly held that defendants' proffered reasons for striking the black venirepersons were legitimate and racially neutral.

In accordance with Batson, the court ruled that plaintiffs established a prima facie case of pur-

poseful discrimination solely on evidence concerning the defendants' exercise of peremptory challenges at the petitioners' trial. Judge Eisele determined that plaintiffs showed they are members of a cognizable racial group and that the defendants used peremptory challenges to remove from the venire members of the plaintiffs' own race. Id., 476 U.S. at 96. Secondly, the court held plaintiffs could rely upon a presumption that peremptory challenges permit "those to discriminate who are of a mind to discriminate," and that an inference of purposeful discrimination sufficient to require an explanation for the challenge was created. The Court based this on the fact that defendants were white and Marvin Williams was black, as well as the racial climate of the 1960's.

In its opinion, the Court correctly stated at page 7 that defendants, in accordance with Batson, may not rebut a prima facie case of discrimination by affirming their "good faith in making individual selections," Id., 476 U.S. at 98, or relying on

counsel's "assumption - or his intuitive judgment - that [the venireperson] would be partial to [the plaintiffs] because of their shared race." Id., at 97.

Judge Eisele went on to correctly note that the defendants must give a "'clear and reasonably specific' explanation of [their] 'legitimate reasons' for exercising the challenges." Id., at 98 n. 20 (citations omitted), and that plaintiffs may then attempt to demonstrate that the proffered reasons are pretexual. United States v. Wilson, 816 F.2d 421, 423 (8th Cir. 1987).

The Court and petitioners part company in that although the Court reluctantly condoned the legitimacy of the reasons proffered by defendants' counsel for excluding the black venirepersons, the plaintiffs do not. The Court erred in making this assessment, both in its interpretation of the facts, and in its failure to apply the comparability standard set forth in United States v. Wilson, supra, and Garrett v. Morris, 815 F.2d 509 (8th

Cir. 1987), Crt. denied, _____ U.S. _____, 108 S. Ct. 233, 98 L. Ed. 2d, 91 (1987). The Eighth Circuit clearly erred in its holding which rubber stamped Judge Eisele's decision. The District Court's findings that defense counsel exercised their strikes according to neutral criteria, and not for racially discriminatory purposes, does not contain adequate support in the record. Even though the Eighth Circuit's decision was based on an affirmation of the United States District Court's findings of fact, pursuant to Federal Rule of Civil Procedure 52(a), that finding may be set aside by a higher court when determined to be clearly erroneous.

The rule provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness." However, in Anderson v. Bessemer City, 470 U.S. 563, 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), the United States Supreme Court, in quoting

United States v. United States Gypsum Co., 333 U.S. 364, 394-395, states: "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

In the present case, a mistake was clearly committed by the trial judge and Eighth Circuit in affirming defendants' peremptory strikes of the black venirepersons. The reasons offered for the strike were pretexual. Beyond that, the reason offered for the strike of one of the venirepersons, Veola Sebastian, was racially discriminatory and stereotypical on its face. Before discussing the factual circumstances surrounding the peremptory strikes, petitioners submit to the Court that the proper standard for determining whether the strikes were neutral was not employed by the Court in assessing the situation. That standard is set forth in two Eighth Circuit Court rulings, United States v.

Wilson, 853 F.2d 606 (8th Cir. 1988), and Garrett v. Morris, supra.

U.S. v. Wilson, 853 F.2d 606 (8th Cir. 1988), was first heard by the United States Court of Appeals in May, 1988, after defendant's conviction in the United States District Court for the Eastern District of Arkansas, Garnett Thomas Eisele, Chief Judge, of defrauding the government, was affirmed by the Court of Appeals, 806 F.2d 171. On rehearing, the Court of Appeals, 815 F.2d 52, vacated the affirmance and remanded the case for hearing. Following the hearing in the District Court ruling that there had been no Batson violation, defendant appealed. The Court of Appeals reversed and remanded the case, holding that in determining whether a prosecutor has presented neutral explanation for use of peremptory challenges against blacks, the Court must compare the characteristics of the individual which prompted the Government's strike with characteristics of those not struck by the Government.

The Court also noted that "what constitutes a neutral explanation is a question of comparability." Id., at 610. The Court stated:

> Essentially, one must compare the characteristics of the individual which prompted the Government's strike with the characteristics of those not struck by the Government. In order to have a neutral explanation, the characteristics of the stricken individual cannot be present in those white panel members not struck by the Government. For example, if the Government strikes one prospective black juror because of the cut of his or her clothing, this peremptory challenge will be suspect if the Government allows white panel members with a similar cut of cloth to remain on the panel. Other circuits have adopted this concept of neutrality. See, e.g., United States v. Thompson, 827 F.2d 1254, 1260-61 (9th Cir. 1987); see also Roman v. Abrams, 822 F.2d 214, 228 (2d Cir. 1987) (comparability under a sixth amendment analysis); Garrett v. Morris, 815 F.2d 509, 514 (8th Cir.) (comparability under application of Swain principles), cert. denied, ____ U.S. _____, 108 S.Ct. 233, 98 L.Ed.2d 191 (1987).

U.S. v. Wilson, 853 F2d. 606, 610 (8th Cir. 1988).

In his opinion, Judge Eisele stated that he had stayed the ruling on plaintiffs' motion for new trial due to the fact that Wilson had been vacated for reconsideration en banc, Id., 861 F.2d 514.

Wilson was decided, Id., 884 F.2d 1121 (8th Cir. 1989) (en banc). In rendering his decision, Judge Eisele stated at page 10, that:

> "It is unclear how much of this comparability test remains. Upon rehearing en banc, the Eighth Circuit explicitly chose not to address the Government's explanation for five of the six strikes and focused on a sixth in which comparability was not clearly at issue. United States v. Wilson, supra, 884 F.2d at 1122. The Government explained it had exercised the sixth strike against a black venireperson because it had information that the defendant, a prominent black attorney, would attempt to contact jurors and, the Government reasoned, would more likely approach a black juror who resideed in the same town as the defendant than white jurors who also lived in the same town. Id., 1122-23. The Court concluded that this explanation constituted "a stereotypical racial reason for striking the potential black juror ..." Id., at 1124. In short, the Court held, the explanation demonstrated that the strike was used because of the juror's racial affiliation, and therefore violated Batson.
>
> "Unlike Wilson, the explanation offered by the defendants for striking Ms. Sebastian does not depend on her racial affiliation. If through voire dire, or otherwise, it develops that a particular juror is deficient in the intelligence needed to understand some aspect of the case, then that circumstance will provide an adequate basis for exercise of a peremptory challenge under Batson. Such assessments are indeed subjective. Yet it is the very essence of

> the peremptory challenge to allow an attorney to "act on only limited information or hunch" in exercising his "intuitive judgment" that a particular juror would be unfit for the case to be tried. Batson, 476 U.S. at 123 (Burger, C.J. dissenting). Batson modifies the breadth of an attorney's discretion to strike jurors by foreclosing as a possible reason for such strikes the intuitive judgment that a potential juror will favor his client's adversary because of shared racial or ethnic affiliation. Batson does not prohibit subjective assessments of a juror's qualifications when such assessments are based on qualities other than race.
>
> Ultimately, this Court's obligation to determine whether peremptories were exercised for the purpose of intentional discrimination requires a finding of fact. Batson, 476 U.S. at 98 n. 21. Having conducted the voire dire in chambers, on a one-to-one basis, and having had the opportunity to closely observe the demeanor of the jurors, the Court finds that the defendants' proffered explanation was clear and specific and entirely credible. Moreover, it is clear to the Court that none of the other white venirepersons who formed the petit jury exhibited characteristics comparable to those that led the defendants to make their strikes. In sum, the Court does not find intentional discrimination in the defendants' exercise of peremptory challenges."

A review of the facts in this matter will show that Judge Eisele and the Eighth Circuit clearly erred in determining that: 1) the explanations proffered by defendants for striking the jurors

were not pretexual, and were clear, specific and entirely credible; 2) that none of the other white venirepersons who formed the petit jury exhibited characteristics comparable to those that led the defendants to make their strikes; and 3) that intentional discrimination in the defendants' exercise of peremptory challenges did not occur.

Petitioners have submitted an exercepted voire dire transcript to the Supreme Court along with this petition for Writ of Certiorari. The transcript records the Court's voire dire examination of the two black venirepersons from the panel who were stricken by defendants, and the discussion surrounding the plaintiffs' motion for mistrial resulting therefrom.

James Fountain and Veola Sebastian were the only two black individuals on a venire of prospective jurors. Because the plaintiffs' lawsuit, as well as the related criminal investigation, generated substantial media attention prior to trial, the Court asked during

voire dire whether any of the members of the venire had read or seen news accounts about the case. Eighteen of the first twenty-three members of the venire said they had - including Ms. Sebastian and Mr. Fountain. (Their transcripted testimony is attached hereto as appendices I and J, respectively.)

In rendering his decision, Judge Eisele and the Eighth Circuit rubber stamped the reasons for striking those two jurors provided both in defendants' reply to plaintiffs' motion for mistrial, and the transcript, apparently without giving any independent thought or analysis to the voire dire examinations themselves, which clearly reveal defendants' contentions to be pretexual and racially stereotypical.

In defendants' brief in support of reply to plaintiffs' motion for new trial, attached hereto as appendix K, defendants state, as to Fountain, that the reasons supporting his strike are "clearly nonracial." Defendants state at page 3 of their

brief that: "Fountain, the record will show, held a masters in psychology, was a college professor and minister, yet was unemployed. He had sued his former employer and was the divorced father of five children. These characteristics create a picture of instability, undesirable in a juror."

As to Veola Sebastian, defendants contend: "Veola Sebastian was an unmarried mother of two, and a factory worker by occupation. At the time she was called, the voire dire was being conducted on an individual basis in chambers, allowing a more relaxed and personal examination. Ms. Sebastian's responses to questions from the Court and the attorneys were mostly monosyllabic in nature. She gave a distinct appearance of having a low intelligence level, reflected by her lack of responsiveness. Developing an opinion about one's intelligence is unquestionably a subjective undertaking, but intellect is also an unquestionable legitimate factor to consider, particularly for a case expected to extend several days and produce the

testimony of a forensic pathologist and a neurosurgeon."

Further, the explanation offered at voire dire by defendants for the exclusion of Mr. Fountain and Ms. Sebastian is even more offensive, pretexual, and racially stereotypical. At pages 94-96 of the voire dire transcript, Robert Henry, counsel for defendant Castleberry, volunteered his reasons for excluding the black venirepersons in question, and the Court's response is recorded in appendix N attached hereto.

At pages 97-99 of the voire dire transcript, the Court also recorded the objections of John Wesley Hall, plaintiffs' counsel to the defendants' reasoning, and the responses of defendant and the Court. (Attached hereto as appendix O.)

In summary, a review of the actual transcript of the voire dire examination of Mr. Fountain and Ms. Sebastian fails to give <u>any</u> semblance of credence to the pretexual reasons offered by defendants for their exclusions, or to Judge Eisele's

contention at page 11 of his Memorandum and Order attached hereto as appendix C that "the defendants' proffered explanation was clear and specific and entirely credible." In addition, the record fails to make any reference or give any credence to Judge Eisele's assertion at page 9 of his written Memorandum and Order that "Ms. Sebastian responded to the Court's questioning in a noticeable slow and tentative manner," that her demeanor during voire dire suggested a poor educational background," or that her intelligence was deficient. As to Mr. Fountain, the recorded voire dire provides no reference point for Mr. Henry's contention that Fountain was "squirrely."

Secondly, the record fails to reflect any basis for Judge Eisele's contention at page 11 of his Order that "none of the other white venirepersons who formed the petit jury exhibited characteristics comparable to those that led the defendants to make their strikes." In reality, the record fails to reflect any attempt by either the Court or defense

counsel to question any other white venirepersons in an effort to gauge their educational background, speaking ability, or intelligence level.

Third, a review of the complete factual history, applicable law, voire dire transcript, and lower court decisions, will paint a vividly disturbing portrait of the blatant racial discrimination which occurred in this case.

The list of information available on the jurors at the time of trial, which was July 20, 1988, is attached hereto as appendix L. It states that James Fountain, of Little Rock, is aged 39 and divorced, with five children. It cites his profession as a minister and college professor, and states that he has been an Arkansas resident for life. On page 25 of the voire dire transcript, Mr. Fountain stated, in response to questions from the Court whether any members of the venire had ever participated in a lawsuit, that he was a plaintiff in a lawsuit filed against the university. The Court further questioned him at page 54 of the

transcript. The Court asked Mr. Fountain if he had heard something or read anything about the Williams case either in the newspaper, television or radio. His response is attached hereto as appendix J.

The voire dire examination of Ms. Sebastian begins at page 72 of the transcript, attached hereto as appendix I.

The reasons proffered by defendants in the Williams' case for the exclusion of Ms. Sebastian are virtually identical to the reasons set forth by the prosecutor in another Eighth Circuit case that were struck down as pretexual and discriminatory on appeal to that court. In Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987), Gerald Duane Garret appealed from an order of the District Court denying his petition for writ of habeas corpus. Garrett argued that the State's exercise of its peremptory challenges to exclude all black jurors form the petit jury panel at his murder trial violated his Sixth Amendment right to a jury chosen from a fair cross-section of the community and his Fourteenth

Amendment right to equal protection of the laws. The Court of Appeals reversed the District Court on the basis that the record in the case demonstrated that the prosecutor used his peremptory challenges in an impermissibly discriminatory manner.

In that case, Garrett, who was black, was tried in May 1980 in St. Louis County Circuit charge on capital murder charges. Following a lengthy voire dire examination of prospective jurors, the prosecutor utilized three of his peremptory challenges to exclude the only three black venirepersons from the petit jury panel. When the defense moved for a mistrial on the ground that the prosecutor's decision to strike the three jurors was based on improper racial considerations, the prosecutor volunteered the following explanation for his actions:

> I think the record should reflect that the fact that the three jurors was black was not my reason for striking them, but, instead, it was the background, education, and knowledge to understand fairly sophisticated scientific evidence which I intend to bring to the jury in this case.

Garrett v. Morris, 815 F.2d 509, 510 (1987).

The trial judge denied the motion for mistrial and Garrett was subsequently convicted of first-degree murder and sentenced to life imprisonment. The Missouri Supreme Court affirmed his conviction and sentence on direct appeal, and Garrett then filed the present habeas corpus petition. The District Court rejected the claim and his appeal followed.

The Court analyzed Garrett's claim that the prosecutor's use of peremptory challenges violated his right to equal protection of the laws pursuant to Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In its analysis, the Court stated a defendant can make out a prima facie case of purposeful discrimination on proof that the prosecutor perverted the peremptory-challenge system by using his challenges to exclude blacks from the jury for reasons unrelated to the outcome of the case on trial, but that a defendant cannot establish an equal-protection violation "solely on proof of the prosecutor's use of peremptory chal-

lenges to strike black jurors at the defendant's own trial." Garrett, Id., at 511, quoting Griffith v. Kentucky, _____ U.S. _____, 107 S.Ct. 708, 7190, 93 L.Ed.2d 649 (1987).

The Court further stated that although Swain was overruled in part in Batson v. Kentucky, supra in which the Supreme Court held that a defendant "may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial," Id., at 511, quoting 106 S.Ct. at 1722-23, Batson did not apply retroactive to a case on federal habeas review. The Court, however, held that Garrett's record was sufficient to establish a violation of the equal-protection principles of Swain, and therefore overcame the presumption protecting the prosecutor in that case.

In Garrett, the Eighth Circuit ruled that the reasons proffered by the prosecutor for the exclusions were actually racially motivated and a

pretext for discrimination. The court looked to the record of the voire dire and determined that the prosecutor's questions to the assembled venire "focused mainly on prior jury service, acquaintance with prospective witnesses, past association or involvement with the criminal-justice system, knowledge or information about the case, and past area of residence," Garrett, supra, at 513.

The Court then looked to the record and compared the background of the black jurors to the white venirepersons and determined that the prosecutor's statement that he struck the black jurors on the ground that they "lacked education," was meritless. The blanket assertion applied to three black jurors who were totally different in background, sex, and occupation, and the educational background of the majority of the whites selected as jurors was not radically different to that of the blacks.

In addition, the three excluded blacks all had a high school education, and one had nearly

completed college. Of the remaining white jurors, two had not completed high school, and two did not specify the extent of their education (one had been a factory worker and the other an electrician). In fact, only two of the jurors selected had been graduated from college. A third had an associate degree from a junior college, and the remaining jurors had a high school education. In addition, the court said the record did not indicate that the black jurors had any difficulty understanding or responding to questions which set them apart from white jurors who remained on the jury panel.

In summary, the Garrett court determined that the reasons volunteered for exclusion of the black venirepersons were not fairly supported by the record; that the prosecutor's rationale that the blacks lacked education and knowledge was pretexual in light of his decision not to strike white jurors who differed in no significant way; and that there were no other legitimate trial related reasons for striking all three black jurors. The court stated

that the prosecutor's disclaimer of racial motives was irrelevant because he in effect excluded all blacks from the petit jury in the belief that, as blacks, they were not qualified to serve as jurors at the trial of a black defendant. Under those circumstances, the court was completed to conclude that the proffered explanation was a pretext for purposeful discrimination, and that Garrett's constitutional rights were violated.

In light of the Garrett decision, as well as U.S. v. Wilson, 853 F.2d 606 (8th Cir. 1988), which holds that the court must compare the characteristics of the individual which prompted the government's strike with characteristics of those not struck by the government to determine if a neutral explanation for use of peremptory challenges against blacks has been made; and U.S. v. Wilson, 884 F.2d 1121 (8th Cir. 1989) which holds that the defendant must be given an opportunity to demonstrate that government's proffered reasons for challenging black jurors are pretexual, the

petitioners will analogize the voire dire in Marvin Williams' case with the reasoning asserted therein.

Although the decisions rendered by the District Court and Eighth Circuit clearly show that those courts conducted no meaningful analysis of the Williams' voire dire transcript, in terms of comparing the excluded black jurors to the white venirepersons, it is essential that this be done. A thorough analysis of the manner in which the voire dire was conducted, the types of questions asked, and the lack of comparability between the black and white venirepersons will clearly reveal that the reasons proffered by defendants for exclusion of the black venirepersons were pretexual and racially discriminatory.

The excerpted voire dire shows that the District Court began its inquiry of the jury panel by asking its members if any had any relationships to the individual plaintiffs and defendants. The court then continued to ask a series of questions designed to elicit the following information:

whether any of the panel members lived, or had ever lived in Faulkner County; whether any members had been employed by or worked for Faulkner County; the nature or degree of any relationships to the individual attorneys; the existence and extent of any prior jury service; and if anyone had ever read or heard anything about Marvin Williams' case.

At the conclusion of the series of general questions, Judge Eisele asked the jurors who had heard anything about the case to stand up and state their names. He then asked the venirepersons if any had an opinion as to any issues in the case, requesting that they stand and state their names. (Tr. at 29.) He proceeded to inquire of any individuals who had relatives in law enforcement if they would be prejudiced for or against either party, whether anyone had talked to any of them about the case, and if anyone knew of any reason why they should not be a juror on account of a prejudicial mind set.

At that point, Judge Eisele stated that he was going into chambers and that the individuals who had acknowledged reading or hearing about the case would be called in one at a time for the purpose of conducting a more thorough voire dire. (Tr. at 31.)

While in chambers, Judge Eisele and the attorneys determined that three jurors who had relationships to Faulkner County needed to be questioned, and those jurors were called in. (Tr. at 34-43.) General questions were asked of the three, Jim Crimmins, Suzanne Huseas, and Mary Jo Wade, regarding whether they knew the defendants, had opinions of the case, and whether they paid real property taxes and personal property taxes. (The taxpayer status was a concern as the attorneys felt a judgment rendered against Faulkner County could theoretically result in a tax increase.)

When finished with those individuals, the court went back to the general list and called the remaining venirepersons in for questioning. (Tr. at 44-74.) Those interviewed were questioned in a

general manner regarding what they had heard or seen about the case, and whether it would affect their ability to be an impartial juror. A few jurors were asked specific questions regarding their relationships to individual parties or Faulkner County. One venireperson who was selected to be a juror, Cathy Hollingsworth, was questioned regarding her status as a defendant in a lawsuit. (Tr. at 53.) (Also note that the record reflects that Ms. Hollingsworth was the only white venireperson to reveal her educational background during the entire voire dire process. Tr. at 10-11.)

Aside from Ms. Hollingsworth, who stated in open court that she had received a college degree from the University of Central Arkansas at Conway, none of the other whites were even questioned at all about their educational background. In fact, the record fails to reflect any line of questioning that could even be construed to be designed for the purpose of determining a white venireperson's

intellectual level. Therefore, the only other source of possible determining a panel member's educational background was contained in the juror information sheet, attached hereto as appendix L.

In fact, the question of education did not come up at all during voire dire conducted in chambers until the first black venireperson, Mr. Fountain, was called in. (Tr. at 55.) The first question asked of him by Mr. Adkisson concerned his tenure at the University of Central Arkansas in graduate school No questions were asked regarding his involvement in a lawsuit, which was a reason proffered by defendants for excluding him as a juror. That information was volunteered by Mr. Fountain in open voire dire earlier when the Court asked if any panel members had ever participated in a lawsuit or hearing as a party or witness. Mr. Fountain responded that he had been a plaintiff in chancery court in a lawsuit filed against the university. (Tr. at 25-26.) He further revealed that he was unemployed at that point, but was

waiting for a teaching position at Tuskegee Institute. No questions were asked regarding his marital status, personal life, or anything else that would provide information as to his stability, which was another reason proffered by defendants for striking him as a juror.

As to the only other black venireperson, Ms. Veola Sebastian, (Tr. at 72), the transcript reveals that she responded appropriately to the questions asked of her. In fact, she stated that although she had heard of the case, that she had not formed an opinion about it and that she would not be prejudiced in any way. None of the parties questioned her about her personal life or educational background. In fact, the only information provided on her was that cited on the juror sheet. It revealed that at the time of trial, she was 36 years of age, single with two children, a factory worker, and an Arkansas resident for life. The record fails to reflect any evidence that she was unintelligent and incapable

of understanding the issues in the case. In addition, there was nothing to support Mr. Henry's contention at page 95 of the transcript that she "was the least qualified of all the members of the panel to serve on a jury as complicated as this."

In fact, a comparison of the background of Ms. Sebastian and Mr. Fountain with the other white venirepersons will reveal that some of the white jurors had similar backgrounds.

First, as the Ms. Sebastian, there were two other white women selected as jurors who were her approximate age, had children, and were not married. They were Suzanne M. Huseas, who was 30 years of age, and divorced with one child, and Nancy J. McGowen, who was aged 37, and widowed with one child.

In comparing Ms. Sebastian's educational background with those of the white jurors, it is important to note that although the juror sheet lists her as a factory worker, nowhere does the record reflect that she actually explained what her educa-

tional background was. It was not listed on the juror sheet, and it was not elicited in voire dire, by either the attorneys or Judge Eisele. Because the record is silent on this matter, the reviewing courts had no way of knowing whether Ms. Sebastian was a high school dropout, a high school graduate, a college graduate, or the recipient of some type of vocational training.

As no other white jurors except Ms. Hollingsworth were questioned <u>at all</u> regarding their educational background, the only other source of information in the record on this matter is continued in the juror sheet. A review of the names of the jurors selected for jury duty, attached hereto as appendix L, provides at best, only limited information.

Comparing the list of jurors selected (see appendix M) to the information on the juror sheet, the only way to ascertain the number of college graduates among the whites selected is to look at their occupations and determine which ones were in

professions that generally require a college degree.

The list revealed one retired teacher, two elementary school teachers, one accountant, and one high school teacher. It can be safely assumed that these individuals had college degrees. The only other individual cited who could also be safely presumed to have a college degree was a 51 year-old man who was marketing manager for a life and casualty company.

As to the occupations of other members of the petit jury that are cited on the juror list, it is difficult to ascertain whether college degrees, high school degrees, or vocational technical training was required.

The other jurors not already listed herein included: a 56 year old farmer; a 28 year old divorced woman who worked in sales for an office systems company; a 39 year old man who was married and a field service engineer; a 28 year old married woman who was a warehouse supervisor for a depart-

ment store; and a 39 year old married woman who was a secretary/bookkeeper for an engineering company.

Of those mentioned earlier, Nancy McGowen was a bank teller, and Suzanne Huseas was an aide for a human development center. Between the two, Suzanne Huseas bears the most similarity to Veola Sebastian, as her job, like that of a factory worker, is one that generally does not require a college degree. In addition, neither the job of a factory worker, nor a development aide, generally requires any specialized training or even a high school degree. As the record is unclear on the educational backgrounds of both Ms. Sebastian and Ms. Huseas, their particular circumstances are unknown.

In conclusion, upon examination of the entire record of this matter, including the excerpted voire dire, it is quite apparent that defendants' proffered reasons for excluding both Mr. Fountain and Ms. Sebastian are neither credible nor legitimate.

The defendants' contentions that Ms. Sebastian was incapable of understanding complex medical and scientific testimony and was unresponsive to the questions asked of her are clearly not supported by the record. Further, allegations that her educational background was questionable is irrelevant, as the record fails to provide any conclusive substantiation that her background was poor, that she was unintelligent, or that her background varied significantly from other white venirepersons selected to be on the jury. Further, the record fails to indicate that any attempt was made to determine the educational backgrounds of the white venirepersons or to strike those who clearly did not have advanced educational degrees or training. To take the analysis a step further, no questions were advanced in the record for the specific purpose of determining a juror's intellect - to either black or white jurors.

The record also clearly fails to support the reasons proffered by defendants for striking Mr.

Fountain from the jury panel. In the voire dire, Mr. Henry volunteered that Mr. Fountain would not make a good juror because he was "squirley" [sic], had sued his employer, and "would not make a good juror because of his background and the way he answered questions." (Tr. at 94.)

In reality, the record revealed that Mr. Fountain, who had a master's degree, was a minister and college professor. The record reflects that he provided direct responses to defendants' questions and that although he was unemployed, he was awaiting a prospective position at Tuskegee Institute in Alabama. No other specific questions were asked as to his employment status, or reasons for being unemployed to determine if they were legitimate. (See Tr. at 55.) As to defendants' contention that he had been a plaintiff in a lawsuit against his former employer, (Tr. at 94) again, the record fails to substantiate that claim. The record reflects that Mr. Fountain had been a graduate student at the University of Central Arkansas in

Conway (Faulkner Co.) from 1980-82, (Tr. at 11) and that he sued the University as a plaintiff in a lawsuit in Chancery Court three years prior to the trial. (Tr. at 25-26.) However, nowhere is it mentioned in the record that Fountain had been formerly employed by the university. This appears to be an assumption on the part of defendants' counsel.

Further, the record clearly shows that neither the attorneys nor Judge Eisele elicited from Mr. Fountain any details about the lawsuit. There is absolutely nothing in the record to substantiate defendants' claims that Fountain was unstable or unsuitable as a juror in any way. Furthermore, another panel member who had been a defendant in a lawsuit was selected to be a juror. (See Cathy Hollingsworth voire dire, Tr. at 26.)

Under the circumstances, the defendants' ill advised decision to exercise their peremptory strikes against the only two black venirepersons on the panel was clearly pretextual. In addition, de-

fendants contention that Ms. Sebastian was intellectually inferior to the other white venirepersons was based on a stereotype perpetuated by some Caucasians that blacks are generally less intelligent than whites.[8] This leaves petitioners with the undeniable and irrefutable conclusion that the strikes were based strictly on the impermissible motive of racial discrimination. Although defendants' responses for exercising the strikes appealed to Judge Eisele as being reasonable, in reality, they were hollow excuses for eliminating blacks from the petit jury of a civil rights claim filed by black litigants.

Racial prejudice is a disturbing, yet undeniable part of the framework of our society. The defendants in the Williams' case had every conceivable motive for wanting to exclude blacks from the jury box - especially one with a graduate degree,

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[8] Arthur Jensen, a psychology professor at the University of California, Berkeley, argued in a report published in the Winter 1969 edition of Harvard Educational Review that blacks are less intelligent than whites which accounts for lower IQ test scores of blacks.

like Mr. Fountain. It would be to their distinct advantage to eliminate anyone who had an obvious affiliation or degree of empathy with the African-American culture. White men were on trial for falsely arresting, then murdering, then conspiring to cover up the manner of death of a young black man in a county jail in the racially charged climate of the 1960's. The defendants' future course of life and well-being was at stake. —

In addition - quite frankly - defendants' counsel obviously thought they could get away with this travesty of justice, and unfortunately to this day have done so. At the time of trial, Batson had yet to be construed as applicable to civil cases, and as the racially discriminatory challenges were exercised prior to the Supreme Court's decision in Leesville. In essence, by exercising their peremptory challenges against the only two black panel members, the defendants' counsel gave every appearance of believing that defendants could, once

again, violate Marvin Williams' constitutional rights unscathed.

The conspiracy to violate the constitutional and civil rights of Marvin Williams that began in 1960 continued in the courtroom on July 20, 1988, and has unfortunately, been extended until this day. For the sake of preserving the integrity of the judicial system, as well as ensuring petitioners' well-founded rights to seek redress for the flagrant and gross violation of Marvin Williams' constitutional rights, petitioners are asking the Supreme Court to grant the petition for Writ of Certiorari, and to reverse and remand the Eighth Circuit's affirmance of the District Court's Order. It is petitioners' request that the Court will grant them a long-awaited and much deserved opportunity to simply obtain a fair civil proceeding - with the hope that justice will finally prevail in the matter of the violent, untimely, and wrongful death of Marvin Williams.

CONCLUSIONS

For the foregoing reasons, the Court should grant Cert to determine whether the Eighth Circuit's affirmance of the District Court's denial of plaintiffs' motion for new trial was clearly erroneous in light of the Supreme Court's holdings that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Emogene Williams Cobin; Bonnie Williams Gilbert; Caroline Williams Giles; Barbara Williams Guinn; Verna Williams Hammond; Donna Williams Lockhart; Ernestine Williams Webb; Delavah Williams; Johnie Williams; Ricky Williams; Ronnie Williams; Sharon Williams PETITIONERS

VS.

James T. Castleberry, Co-executor of the Estate of Joe L. Castleberry, Deceased; City of Conway, Arkansas; Arkansas Faulkner County; Joe Martin; Jocile C. Perry, Co-executor of the Estate of Joe L. Castleberry, Deceased, RESPONDENTS

CERTIFICATE OF SERVICE

I, Jack T. Lassiter, a member of the bar of this court, hereby certify that the annexed Petition for Writ of Certiorari to the Supreme Court of the United States has been timely filed, pursuant to Rule 28.2 of the Rules of this Court by delivery

via Federal Express, postage pre-paid, addressed to the Clerk of this Court.

I further certify that I have served the Petition for Writ of Certiorari on Respondent by placing a copy in the United States Mail, first class, postage pre-paid, addressed as follows: Robert Henry, attorney for Joe Martin an the Estate of Joe L. Castleberry, Deceased, 627 Locust, Conway, AR 72032; and William C. Adkisson, attorney for Faulkner County, 801 Parkway, Conway AR 72032.

JACK T. LASSITER
Attorney for Petitioners

ACKNOWLEDGEMENT

STATE OF ARKANSAS)
) ss
COUNTY OF PULASKI)

Subscribed and sworn before me, a Notary Public, on this 22nd day of August, 1991.

Notary Public

My commission expires:
7-17-91

MILDRED R. KASSLER NOTARY PUBLIC PULASKI COUNTY ARK.